

The Foreign Corrupt Practices Act at Thirty-Five: A Practitioner's Guide

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I. INTRODUCTION

The Foreign Corrupt Practices Act (FCPA) was enacted in 1977 to prohibit U.S. companies and companies operating in the United States from paying bribes to foreign government officials, politicians, and political parties for the purpose of obtaining business opportunities abroad.¹ In the past thirty-five

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years, the anti-bribery provisions of the law remain consistent but its enforcement has expanded considerably. This Article will provide an overview of the FCPA, its evolution, and its current enforcement. The Article is aimed as a resource for practitioners to counsel clients who want to expand into international business or face potential FCPA charges. While this Article will not detail the high-profile FCPA cases, the information here is designed to help today's lawyers understand where the law came from and how the law is being used in the modern environment of ever-increasing international business transactions.

II. ORIGINS AND EVOLUTION OF THE FCPA

Scholars have suggested that the FCPA was drafted in global and economic circumstances not dissimilar to those today. Prior to the FCPA, the United States experienced a rapid economic expansion and involvement with foreign wars, followed by corporate scandals and a quickly declining economy.² In the 1970s, the public was concerned by defective corporate management, inadequate risk calculation, and weak internal corporate communication.³ One need only recall the recent fall of AIG, WorldCom, Lehman Brothers, and the housing “bubble” in recent years to understand some of the environment in which the FCPA was passed in the 1970s.

But there were more specific circumstances that caused Congress to draft the FCPA. In the early 1970s during the Cold War, approximately 400 companies had admitted to paying over \$300 million in bribes to foreign officials.⁴ Stanley Sporkin, the Securities and Exchange Commission (SEC) Enforcement Chief at the time, conducted an investigation uncovering these questionable or illegal payments from over one hundred Fortune 500 companies, including Exxon and Lockheed Martin.⁵

The philosophy behind the law is that corrupt systems are unjust and unstable, with bribes often spiraling out of control and only providing a short-term benefit.⁶ Bribes increase product prices, reduce corporate profits, and are suggested to decrease growth and lower per capita income.⁷

thank Laura Hartnett, Esq. for her invaluable contributions to this Article. This Article is dedicated to Mr. Crites's grandchildren, Tommy and Peyton Conklin.

¹ See generally Homer E. Moyer, Jr. et al., *The U.S. Foreign Corrupt Practices Act: Its Origins, Development, Implementation, and Issues to Watch*, 14 INT'L Q. 455, 459 (2002).

² Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 500 (2011).

³ *Id.*

⁴ Eric M. Zyla, *Foreign Corrupt Practices Act: A Brief Overview*, 4 ANKARA B. REV. 11, 13 (2011).

⁵ Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 93 (2010); H.R. REP. NO. 95-640, at 4–5 (1977).

⁶ Zyla, *supra* note 4, at 17.

⁷ *Id.* at 17.

At the time that the FCPA was first contemplated, Congress considered a mandatory disclosure approach in which companies would be required to publicly disclose corrupt foreign payments or risk criminal penalty.⁸ In the end, Congress chose the criminalization approach, making improper payments to foreign officials illegal and not requiring disclosure outright.⁹ The federal agency prosecuting acts under the FCPA must prove a list of elements to determine if a bribery occurred.¹⁰

A. Bribes and Extortion Payments

One of the major challenges to the FCPA is detecting and prosecuting bribery.¹¹ Companies operating abroad experience a variety of demands for money above and beyond the goods and services that are the subject of the transaction. Bribes can be as small as extra money to customs officials, requests for sponsorship of an activity or event, or the purchase of stamps for employee passports permitting them to move more freely throughout the country.¹² While these relatively small payments may help to improve a corporation's treatment in the country, extortion demands a payment or the corporation will risk worse treatment in the country.¹³ Extortion might include extra payments, compensation, surcharges, or fictitious fines.¹⁴

The exact amount of money paid in bribes or transactions in which a bribe is offered or requested is nearly impossible to calculate, although organizations are trying to collect such data.¹⁵ What is tricky about bribes and other FCPA issues is that foreign agents can conceal bribes as "service fees," "facilitation fees," or "commissions" that are hidden to the corporation paying such fees.¹⁶ Also, some companies may only find out that the foreign company with which they are transacting business has government ownership or strong ties after they are deep in the commercial transaction.¹⁷

⁸ Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and Its Consequences*, 7 N.Y.U. J.L. & BUS. 247, 260 (2010).

⁹ *Id.* at 261.

¹⁰ Bixby, *supra* note 5, at 94.

¹¹ Zyla, *supra* note 4, at 15.

¹² Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 795 (2011).

¹³ *Id.* at 795–96.

¹⁴ *Id.* at 796.

¹⁵ *Id.* at 797–98.

¹⁶ *Id.* at 811.

¹⁷ *Id.*

B. Amendments to the FCPA

1. 1988 Amendments

The earliest call to amend the FCPA came in the late 1980s when the U.S. trade deficit remained high. Critics wanted to eliminate obstacles against exports and noted that the law “was so vague as to be indecipherable.”¹⁸ It was at this point in time that Congress also recommended that other nations pass similar anti-corruption laws.¹⁹ As a result, the law was amended as part of the Omnibus Trade and Competitiveness Act of 1988.²⁰ In this amendment, Congress made the *mens rea* requirement more strict.²¹ It also clarified the meaning of “retaining or obtaining business” under the FCPA.²² At the same time, these amendments expanded the FCPA’s scope to include foreign citizens and businesses acting within the United States.²³

2. 1998 Amendments

The second round of amendments was a direct response to the Organisation for Economic Co-operation and Development’s (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, held in November of 1997.²⁴ At this convention, the OECD called on each of its thirty member countries to institute “effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.”²⁵ Congress ratified the Convention and passed amendments to the FCPA, broadening the language of the original Act, now focusing more upon what the bribers wanted to achieve rather than how they intended to affect or influence the official.²⁶ It expanded the definition of a

¹⁸ Bixby, *supra* note 5, at 97.

¹⁹ *Id.* at 98 n.34.

²⁰ U.S. DEP’T OF JUSTICE, OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988, H. R. REP. NO. 100-576, at 916–24 (1988) (Conf. Rep.), *available at* <http://www.justice.gov/criminal/fraud/fcpa/history/1988/tradeact-100-418.pdf>.

²¹ William Alan Nelson II, *Attorney Liability Under the Foreign Corrupt Practices Act: Legal and Ethical Challenges and Solutions*, 39 U. MEM. L. REV. 255, 258 (2009).

²² *Id.*

²³ *Id.* at 259.

²⁴ *See generally* Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 6 (2011), *available at* <http://www.oecd.org/daf/bribery/ininternationalbusiness/anti-briberyconvention/38028044.pdf>.

²⁵ Bixby, *supra* note 5, at 99–100. In 2009, the OECD adopted additional anti-bribery recommendations and issued a “Good Practice Guidance” which may offer more compliance guidance than the current FCPA. *See* Westbrook, *supra* note 2, at 511.

²⁶ Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 448 (2010).

“foreign official” and extended the FCPA’s jurisdiction outside of U.S. borders.²⁷ Anyone, either acting directly or through an agent, can be prosecuted for furthering a corrupt payment that takes place within the United States.²⁸ Therefore, the Act now implicates foreign agents and U.S. nationals living outside the United States.

III. CONTENTS OF THE FCPA

At its core, the FCPA prohibits bribes to foreign officials and requires detailed accounting standards regarding all foreign payments. This section will also address a few of the nuances in applying these two basic edicts of the law.

A. *Anti-Bribery*

1. *Bribes to a Foreign Official*

The anti-bribery portion of the FCPA prohibits improper payments to a foreign official.²⁹ A “foreign official” is defined as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof.”³⁰ Therefore, this definition includes employees of alleged state-owned or state-controlled enterprises.³¹ This approach to improper payments indicates that every employee, without respect to rank or position of an instrumentality, is a foreign official.³² The Department of Justice (DOJ) has noted that “it is entirely possible, under certain circumstances and in certain countries, that nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a . . . product in a foreign country will involve a ‘foreign official’ within the meaning of the FCPA.”³³ What is more frustrating is that “instrumentality” is not further defined in the law. Companies and their attorneys are left searching for definitions in other laws such as the Foreign Sovereign Immunities Act (FSIA) and its use in other laws.³⁴

DOJ and the SEC have worked on enforcement actions involving improper payments to employees of a company where the state owned as little as 43% of the company’s shares, had veto power, and made operational decisions, despite the company describing itself as privatized.³⁵ What is more, courts have not

²⁷ Bixby, *supra* note 5, at 100.

²⁸ *Id.* at 101.

²⁹ 15 U.S.C. § 78dd-1 (2006).

³⁰ *Id.* § 78dd-1(f)(1)(A) (2006).

³¹ Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99, 108 (2011) [hereinafter Koehler, *Big, Bold, and Bizarre*].

³² Stacy Williams, *Grey Areas of FCPA Compliance*, 17 CURRENTS: INT’L TRADE L.J. 14, 15 (2008).

³³ Yockey, *supra* note 12, at 820–21.

³⁴ Williams, *supra* note 32, at 16.

³⁵ Koehler, *Big, Bold, and Bizarre*, *supra* note 31, at 116–17.

resolved the question of whether those working for a subsidiary of a subsidiary owned by a foreign state are considered agents or instruments of the state itself.³⁶ Yet, when drafting the FCPA, Congress was aware of state-owned enterprises and chose not to include such companies in its definitions or concepts contained within the law.³⁷

As the law was passed in 1977, the definition of a foreign official, however, did not include an employee of a foreign government with ministerial or clerical duties.³⁸ But in 1988, Congress amended the FCPA, removed this exception, and altered the language to create an exception for payments in connection with “routine governmental action.”³⁹ “Routine governmental action” is intended to refer to obtaining permits, licenses, or other governmental approvals to enable one to conduct business in a foreign country, also known as “grease payments.”⁴⁰ “[R]outine governmental action does not include the issuance of *every* official document or *every* inspection.”⁴¹ Instead, it covers “very narrow categories of largely non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries.”⁴² But the federal government has still prosecuted cases under the FCPA that allege payments to secure foreign licenses, permits, applications, and the like.⁴³ Some evidence appears to show that there may be an informal limit of \$1,000 for grease payments.⁴⁴ But there have been no court decisions interpreting the definition of “grease payments;” instead courts have indicated that they would focus on the “intent of the payer and the purpose of the payment.”⁴⁵

2. “Obtain or Retain Business”

The FCPA prohibits offering or paying “anything of value” to a “foreign official” for the purpose of “influencing any act or decision,” “inducing such foreign official to do or omit to do any act in violation of the lawful duty,” “securing any improper advantage,” or “inducing such foreign official to use his influence . . . to affect or influence any act or decision . . . to assist . . . in

³⁶ Westbrook, *supra* note 2, at 533.

³⁷ Koehler, *Big, Bold, and Bizarre*, *supra* note 31, at 117.

³⁸ See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 104, 91 Stat. 1494, 1498, *amended by* Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, tit. V, subtit. A, pt. 1, 102 Stat. 1415 *and by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended in scattered sections of 15 U.S.C.).

³⁹ 15 U.S.C. § 78dd-1(b) (2006).

⁴⁰ 15 U.S.C. § 78dd-1(f)(3)(A) (2006); Bixby, *supra* note 5, at 110.

⁴¹ United States v. Kay, 359 F.3d 738, 751 (5th Cir. 2004).

⁴² *Id.*

⁴³ Koehler, *Big, Bold, and Bizarre*, *supra* note 31, at 122–25 (discussing recent enforcement actions stemming from the payment of grease money).

⁴⁴ Bixby, *supra* note 5, at 110.

⁴⁵ David E. Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 684 (2009) (internal quotation marks omitted).

obtaining or retaining business for or with, or directing business to, any person.”⁴⁶ This so-called business nexus test has little further guidance in the law.⁴⁷

The Fifth Circuit has interpreted this provision as prohibiting payments aimed at lowering taxes and custom duties in a foreign country.⁴⁸ The Fifth Circuit found that the government must show a clear “cause-and-effect”—how the benefit from the bribe will aid the person paying the bribe in obtaining or retaining business and specifically what business that is.⁴⁹ Still, the court found that “the business nexus requirement is not to be interpreted unduly narrowly”⁵⁰ and almost any situation could meet the test with the proper factual allegations.

The FCPA would seem to suggest that corporations are entitled to a defense if they paid extortion costs to prevent serious bodily harm, but this issue has never been clarified. Similarly, economic extortion that may do significant monetary damage has not been excepted in precise terms.⁵¹ One federal court held that “true extortion” is excepted but distinguished economic extortion, noting that a company can always walk away from economic threats.⁵² Businesses are left to wonder on mere conjecture how extreme economic extortion has to be until it is considered “true extortion.”

3. “Anything of Value”

The FCPA does not define “anything of value.” We know from enforcement actions that it can include promises of future consideration and in-kind offers.⁵³ These have ranged from briefcases stuffed with cash to an executive training program at a U.S. university for Chinese officials.⁵⁴ The SEC has even pursued and investigated a case in which a company made a monetary donation to a local charity in an alleged attempt to influence a government official.⁵⁵ There has been no stated *de minimis* exception to define “anything of value.”⁵⁶

⁴⁶ 15 U.S.C. § 78dd-1(a)(1) (2006).

⁴⁷ Williams, *supra* note 32, at 17.

⁴⁸ United States v. Kay, 359 F.3d 738, 756 (5th Cir. 2004).

⁴⁹ *Id.* at 740–41.

⁵⁰ *Id.* at 754.

⁵¹ Yockey, *supra* note 12, at 814.

⁵² United States v. Kozeny, 582 F. Supp. 2d 535, 540 (S.D.N.Y. 2008).

⁵³ Westbrook, *supra* note 2, at 538.

⁵⁴ Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 914–15 (2010) [hereinafter Koehler, *Façade*].

⁵⁵ Westbrook, *supra* note 2, at 539.

⁵⁶ *Id.*

4. *The Issue of Successor Liability*

Recent concern has been expressed from the business community, the media, and politicians alike about the implications of the FCPA for successor liability. For example, a corporation is not immune from FCPA enforcement for the conduct of its subsidiaries that it acquired years after the FCPA violations took place.⁵⁷ As a result, companies are forced to take significant measures to conduct FCPA due diligence before acquiring companies and becoming parties to mergers.⁵⁸ The concern remains that the FCPA then creates an overly cautious business environment in which mergers and acquisitions that would otherwise take place do not.⁵⁹ Some would rather see a safe harbor standard or more clear standards in the next revisions of the FCPA.⁶⁰

B. *Accounting Requirements*

Much like the Sarbanes-Oxley Act of 2002,⁶¹ the FCPA details specific, required accounting and bookkeeping standards that apply to publicly-held entities known as “issuers.”⁶² These companies have securities registered with the SEC, are required to file reports under Section 15(d) of the Exchange Act, or own more than fifty percent of the voting stock in another entity.⁶³ Non-material payments that are not accurately recorded can be construed as a violation of the FCPA.⁶⁴ In addition, the books must be kept with “reasonable detail”⁶⁵ requiring a “level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”⁶⁶ Companies must also create internal accounting control provisions, including such factors as establishing the role of the board of directors, communicating corporate procedures and policies, having competent personnel, assigning authority and responsibility, taking accountability for performance, and performing objective and effective internal audit functions.⁶⁷ The goal of these record-keeping provisions is to prevent three types of wrongdoings: (1) failing to record illegal transactions; (2) falsifying records to conceal illegal transactions; and (3)

⁵⁷ Grimm, *supra* note 8, at 252–53.

⁵⁸ *Id.* at 253.

⁵⁹ *See id.* at 299–300.

⁶⁰ *Id.*

⁶¹ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 & 18 U.S.C.). “[The Sarbanes-Oxley Act] has contributed to increased FCPA enforcement because its reporting requirements expanded the amount of information to which the government has access.” Westbrook, *supra* note 2, at 515.

⁶² *See* 15 U.S.C. § 78m(b)(2) (2006).

⁶³ Bixby, *supra* note 5, at 96–97.

⁶⁴ *Id.* at 96.

⁶⁵ 15 U.S.C. § 78m(b)(2)(A) (2006).

⁶⁶ 15 U.S.C. § 78m(b)(7) (2006).

⁶⁷ Westbrook, *supra* note 2, at 508–09.

creating records that are monetarily accurate but fail to specify qualitative aspects of the transaction.⁶⁸

For criminal liability under this portion of the FCPA, a person must “knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in [the provisions].”⁶⁹ Under the law, there is no criminal liability for technical or insignificant accounting errors.⁷⁰

But given the heightened enforcement environment, liability under the accounting provisions is almost strict liability. There may be criminal liability, however, for willful blindness.⁷¹ Senior executives who fail to act in good faith or directly or indirectly induce FCPA violations can be held liable if bribery occurs under their leadership, even if the executive lacked knowledge of the bribes.⁷² Ultimately, the Judicial Branch plays an active role in sentencing and considers mitigating factors.⁷³

C. Affirmative Defenses

The FCPA does identify two affirmative defenses on which companies and individuals can rely. An individual is not liable for payments that are legal in the country in which they are made, “lawful under the written laws” of the foreign officials’ country.⁷⁴ When this provision was added in 1988, it responded to a criticism that “the United States was more interested in exporting its cultural biases than its products” as certain payments to foreign officials are routine and customary in other countries and cultures.⁷⁵ Ironically, it is worth noting that FCPA experts have never found such a law that explicitly permits such a payment.⁷⁶ Extra payments to foreign officials are more likely to be a customary norm in other countries rather than an officially sanctioned process as written in the country’s laws.⁷⁷

Second, payments for “reasonable and bona fide expenditures” are permitted.⁷⁸ These “reasonable and bona fide expenditures” might include travel and lodging expenses incurred for a foreign official if directly related to

⁶⁸ Dworsky, *supra* note 45, at 676.

⁶⁹ 15 U.S.C. § 78m(b)(5) (2006).

⁷⁰ 15 U.S.C. § 78m(b)(4) (2006).

⁷¹ Westbrook, *supra* note 2, at 547.

⁷² Jon Jordan, *Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend Towards Greater Accountability in The Prevention Of Foreign Bribery*, 7 N.Y.U. J. L. & BUS. 845, 868 (2011).

⁷³ Koehler, *Big, Bold, and Bizarre*, *supra* note 31, at 138.

⁷⁴ 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), & 78dd-3(c)(1) (2006).

⁷⁵ Kyle P. Sheahen, *I’m Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*, 28 WIS. INT’L L.J. 464, 469 (2010–11).

⁷⁶ Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 VA. L. & BUS. REV. 145, 157 (2011).

⁷⁷ Sheahen, *supra* note 75, at 470.

⁷⁸ 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), & 78dd-3(c)(2) (2006).

the “promotion, demonstration, or explanation of products or services” or “the execution or performance of a contract with a foreign government or agency thereof.”⁷⁹ But there still exists many questions as to what promotion expenses are customary and reasonable under the law.⁸⁰ Even minor payments to attempt to favorably influence foreign agents by purchasing some of their goodwill could be considered “corrupt” and aimed at “securing [an] improper advantage.”⁸¹ In one enforcement action, the DOJ settlement indicated that airline tickets for a government official and his family and lavish travel are not reasonable, and cash advances for such travel do not constitute bona fide expenditures.⁸² But paying such expenses as travel, lodging, and gifts for foreign government officials remains one of the most common issues that international corporations face.⁸³

IV. ENFORCEMENT OF THE FCPA

All criminal enforcement of the FCPA and civil enforcement of the anti-bribery provisions of the FCPA falls to DOJ.⁸⁴ All civil enforcement of accounting provisions and anti-bribery provisions of the FCPA falls to the SEC.⁸⁵ Occasionally, courts will permit both DOJ and the SEC to work jointly in a parallel investigation.⁸⁶ In rare occasions, courts will permit private parties to bring civil FCPA claims.⁸⁷ These claims may be brought in conjunction with private suits stemming from RICO civil actions, securities fraud, shareholder derivative actions, whistleblower litigation, ERISA actions, as well as general tort and contract claims.⁸⁸ For example, a shareholder derivative action with FCPA claims may be brought when the company declares it was in compliance with the FCPA and fails to disclose payments of foreign bribes that then result in federal penalties, millions in investigation costs expended by the company, and a decrease in the price of the stock.⁸⁹

⁷⁹ *Id.* § 78dd-1(c)(2)(A)–(B) (2006).

⁸⁰ Williams, *supra* note 32, at 18.

⁸¹ 15 U.S.C. § 78dd-1(a)(1)(A)(iii) (2006); Sheahen, *supra* note 75, at 478.

⁸² Litigation Release No. 20414, U.S. Sec. & Exch. Comm’n, SEC Files Settled Action Against Lucent Technologies, Inc. in Connection with Payment of Chinese Officials’ Travel and Entertainment Expenses; Company Agrees to Pay \$1.5 Million Civil Penalty (Dec. 21, 2007), available at <http://www.sec.gov/litigation/litreleases/2007/lr20414.htm>.

⁸³ Westbrook, *supra* note 2, at 544.

⁸⁴ Jordan, *supra* note 72, at 852–53.

⁸⁵ *Id.*

⁸⁶ Dworsky, *supra* note 45, at 685–86.

⁸⁷ *Id.* at 686.

⁸⁸ Trautman & Altenbaumer-Price, *supra* note 76, at 173–74.

⁸⁹ See *id.* at 174–76.

A. Enforcement Against Individuals

Penalties for violating the FCPA may result in monetary and civil penalties and imprisonment for willful violations.⁹⁰ An individual who violates the FCPA willfully can be fined, imprisoned, or both. However, one cannot be imprisoned without knowledge.⁹¹ Penalties are generally determined in accordance with the advice in the U.S. Sentencing Guidelines.⁹² Willful violations can result in up to \$5,000,000 in fines and a prison sentence of up to twenty years for individuals.⁹³ The Alternative Fines Act can institute penalties up to two times the gross financial gain or loss derived from the improper payment.⁹⁴ And, despite directors and executives possibly operating under the belief that the company will pay any fines found against them as individuals, fines for individuals cannot be paid by their company.⁹⁵

In recent years, fines imposed for FCPA violations have been lower than those recommended under the U.S. Sentencing Guidelines.⁹⁶ While DOJ consistently promotes its FCPA enforcement program as one focusing on the prosecution of individuals, there have been relatively very few individual prosecutions.⁹⁷ One author suggests that this is due to the fact that DOJ cannot satisfy its high burden of proof to criminally indict an individual.⁹⁸

Still, recent enforcement trends with the FCPA demonstrate that there are ever increasing prosecutions brought against individuals. Arguably, the law was written for corporate enforcement but now individuals find themselves as the recipients of federal indictments in about sixty percent of FCPA enforcement cases.⁹⁹ True to the 1998 Amendments expanding the reach of the FCPA, new enforcement actions have been brought against more and more foreign individuals.¹⁰⁰ Lanny Breuer noted in 2010 that in the past five years of DOJ's enforcement of FCPA actions, the Department charged seventy-seven individuals with FCPA violations, resulting in "more than the total number of indictments brought in the previous seven years combined."¹⁰¹ Pursuing the "aggressive prosecution of individuals" and obtaining "significant prison

⁹⁰ 15 U.S.C. § 78ff(c) (2006).

⁹¹ *Id.* § 78ff(a) (2006).

⁹² Dworsky, *supra* note 45, at 687.

⁹³ *Id.* at 688.

⁹⁴ Sheahen, *supra* note 75, at 468.

⁹⁵ 15 U.S.C. § 78dd-2(g)(3) (2006).

⁹⁶ Koehler, *Big, Bold, and Bizarre*, *supra* note 31, at 128.

⁹⁷ *Id.* at 129.

⁹⁸ *Id.*

⁹⁹ Bixby, *supra* note 5, at 111.

¹⁰⁰ *Id.* at 112 (identifying a number of recent examples of foreign individuals charged with FCPA violations).

¹⁰¹ Lanny A. Breuer, Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice, Speech at the Meeting of the Council on Foreign Relations: International Criminal Law Enforcement: Rule of Law, Anti-Corruption, and Beyond (May 4, 2010) *available at* http://www.cfr.org/publication/22048/internationalcriminal_law_enforcement.html.

sentences for individuals” have become the “cornerstone” of FCPA enforcement policy.¹⁰²

B. Enforcement Against Corporations

The maximum penalty for corporations under the U.S. Sentencing Guidelines is \$25,000,000 for willful violations of the FCPA accounting provisions.¹⁰³ The maximum penalty is \$2,000,000 for corporate breaches of the anti-bribery provisions.¹⁰⁴ Yet one has to remember that these criminal penalties can be combined with civil penalties that can include monetary fines and injunctions, and suspension from participating in government procurement activities.¹⁰⁵ In recent years, Congress has added additional penalties for violating the FCPA. Any corporation in violation of the FCPA’s anti-bribery provisions can be debarred from any contract or grant awarded by the federal government within thirty days after final judgment.¹⁰⁶

Recent prosecutions have included a relatively new penalty of the disgorgement of profits tied to any actions related to FCPA violations. In one case, disgorgement contributed to over half of the total monetary penalty.¹⁰⁷ As a result of this new development, the level of the fines, fees, and penalties has dramatically increased in recent years.¹⁰⁸

C. The Era of Enforcement

The year 2004 served as a turning point in the enforcement of FCPA violations (or potential violations). In the first twenty-five years of the FCPA’s existence, DOJ and the SEC only pursued sixty cases against corporations under the FCPA.¹⁰⁹ These cases focused on bribery or issues with accounting records, conspiracy to violate the FCPA, false statements, money laundering, and wire fraud.¹¹⁰ In 2009, the Deputy Chief of the Fraud Section in DOJ’s Criminal Division, Mark F. Mendelsohn, noted that at least 120 companies were the current subjects of ongoing FCPA investigations.¹¹¹ By 2009, federal agencies were pursuing as many as twenty-six prosecutions a year compared to their prior two prosecutions a year.¹¹² The more current investigations by the SEC and DOJ are targeted towards entire market sectors, including oil and gas,

¹⁰² Trautman & Altenbaumer-Price, *supra* note 76, at 160.

¹⁰³ Dworsky, *supra* note 45, at 689.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 689–90.

¹⁰⁶ Overseas Contractor Reform Act, H.R. 5366, 111th Cong. § 2(a) (2010).

¹⁰⁷ Westbrook, *supra* note 2, at 556–57 (2011).

¹⁰⁸ Bixby, *supra* note 5, at 109.

¹⁰⁹ *Id.* at 103.

¹¹⁰ *Id.*

¹¹¹ Trautman & Altenbaumer-Price, *supra* note 76, at 158.

¹¹² Bixby, *supra* note 5, at 105.

technology, pharmaceuticals, and medical supplies.¹¹³ Combined FCPA enforcement by DOJ and the SEC in 2010 resulted in \$1.8 billion in combined corporate fines and penalties.¹¹⁴ But ten years prior, there was one FCPA enforcement action resulting in \$300,000 in fines.¹¹⁵ In 2010, fifty percent of the total fines and penalties collected by DOJ's Criminal Division were FCPA-related enforcement.¹¹⁶ In that same year, DOJ's Assistant Attorney General for the Criminal Division, Lanny Breuer, gave a speech noting the agency's involvement in thirty-six corporate FCPA and foreign bribery-related resolutions with fines totaling more than \$1.5 billion.¹¹⁷ DOJ made FCPA enforcement a priority "second only to fighting terrorism in terms of priority."¹¹⁸

Federal agencies have also ramped up staffing and dedicated more resources to pursuing FCPA actions. Since 2004, DOJ has identified two attorneys to focus only on FCPA cases, and the FBI has created a four-person team to handle FCPA investigations solely.¹¹⁹ In 2009, the SEC announced that it was creating an entire FCPA unit to "focus on new and proactive approaches to identifying" FCPA violations in addition to working closely with its sister agencies and counterparts in foreign countries to address FCPA violations.¹²⁰ The specialized FCPA unit in the SEC is different from a normal unit. The FCPA unit benefits from enhanced training, specialized experience, and targets investigative approaches all towards conducting more efficient and effective investigations.¹²¹ The FCPA unit is also located in locations across the United States, including Boston, Washington, D.C., Fort Worth, San Francisco, and Los Angeles.¹²² With all of this additional personnel across federal agencies, FCPA enforcement will only continue to rise.¹²³

Some of this recently increased enforcement activity may have been due to the economic boom of the mid-2000s, where even small businesses were

¹¹³ Westbrook, *supra* note 2, at 523–24.

¹¹⁴ Koehler, *Big, Bold, and Bizarre*, *supra* note 31, at 100–04.

¹¹⁵ *Id.* at 104.

¹¹⁶ *Id.* at 105.

¹¹⁷ Breuer, *supra* note 101.

¹¹⁸ Grimm, *supra* note 8, at 249–50 (citation omitted).

¹¹⁹ Bixby, *supra* note 5, at 104; *see also* Trautman & Altenbaumer-Price, *supra* note 76, at 162 n.99 ("DOJ also has a dedicated foreign bribery unit within its Criminal Fraud Section.").

¹²⁰ *See* Robert Khuzami, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Remarks Before the N.Y.C. Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), *available at* <http://www.sec.gov/news/speech/2009/spch080509rk.htm>; Cheryl Scarboro, Chief of the Foreign Corrupt Practices Act Unit, U.S. Sec. & Exch. Comm'n, Remarks at News Conference Announcing New SEC Leaders in Enforcement Division (Jan. 13, 2010) *available at* <http://www.sec.gov/news/speech/2010/spch011310newsconf.htm#scarboro>.

¹²¹ Trautman & Altenbaumer-Price, *supra* note 76, at 162.

¹²² *Id.* at 162–63.

¹²³ Westbrook, *supra* note 2, at 560.

reaching abroad and fighting for international business in order to compete.¹²⁴ The following contraction of the market caused many corporate consolidations that may not have taken the time and resources to investigate any prior questionable payments or accounting practices of the newly-acquired company.¹²⁵ The SEC also had to redeem itself in the public eye from a number of high-profile fraud cases that went undetected for years.¹²⁶

D. Enforcement in the Years to Come

There is no sign of stopping these recent trends, and new laws and policies only appear to enhance FCPA enforcement in the future. Enforcement actions are bound to increase after the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010. The SEC has been steadily receiving more than one FCPA tip a day since the law provides for monetary incentives and protections for whistleblowers that report certain securities violations.¹²⁷

Also going forward, a qualifying whistleblower who voluntarily provides original information to the SEC that leads to a successful enforcement action under the FCPA may receive anywhere from ten to thirty percent of the recovered amount.¹²⁸ The long-term impact of this whistleblower “twist” in the law on enforcement actions, in both type and quantity, is yet unknown. There is no end in sight to this steady increase in enforcement cases and the amount of fines pursued in FCPA actions.¹²⁹

E. The Reaction by Corporations to the Era of Enforcement

To avoid or lessen these fines and penalties, companies are spending hundreds of millions of dollars on professional costs in connection with FCPA inquiries and investigations.¹³⁰ One company revealed that it spent \$3.2 million to investigate \$50,000 of allegedly improper payments from a foreign branch that constitutes about .05% of the company’s annual revenue.¹³¹

At the same time, all of this aggressive enforcement against companies by federal agencies has led to more corporations self-reporting FCPA violations. Self-reporting is rumored to result in more lenient sentencing than those who would have been prosecuted for the same illegal action but did not disclose the

¹²⁴ *Id.* at 518–19.

¹²⁵ *Id.* at 519.

¹²⁶ *Id.* at 520–21.

¹²⁷ *Id.* at 525.

¹²⁸ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922 (2010).

¹²⁹ Jordan, *supra* note 72, at 856.

¹³⁰ Koehler, *Big, Bold, and Bizarre*, *supra* note 31, at 106 (noting examples of companies that have spent anywhere from \$3.2 million to \$100 million on professional costs towards internal inquiries and investigations).

¹³¹ Yockey, *supra* note 12, at 823.

action to the appropriate authorities.¹³² Voluntary disclosure shifts enforcement costs to the private sector by encouraging behavior and reporting that is both cheaper and more effective for the federal agencies that pursue FCPA enforcement actions.¹³³ Today, a business may tell federal agencies that it is conducting an internal investigation and then report the results. Ideally, businesses will also cooperate with any resulting government investigation and implement immediate compliance measures to take corrective action against the FCPA violations.¹³⁴

F. Alternative Prosecution Agreements

When a company is faced with FCPA prosecution, many find it cheaper, easier, and more efficient *not* to fight the charges. An offer of a non-prosecution agreement (NPA) or a deferred prosecution agreement (DPA) is likely a more attractive offer than having your company criminally indicted and building a legal defense to the charges.¹³⁵ Typically, NPAs are a contract between a company and the government without court approval, while DPAs typically occur after the government files a formal charge and do require court submission or approval.¹³⁶

These options are a kind of “diversion program” that punishes a business but allows the business to escape the potential consequences of a full prosecution against it.¹³⁷ Essentially, the business signs a contract that defers the company’s prosecution, arranging for any charges to be dismissed after the company successfully completes items in the agreement.¹³⁸ Most DPAs hold the corporation vicariously liable for the acts of its employees, require that the corporation fire wrongdoers, and waive certain procedural rights, while paying a fine and implementing a compliance program.¹³⁹ These agreements may also include a monitoring program for one to three years, requiring the monitor to send periodic reports to the government.¹⁴⁰ “A monitor is an external person who often sits on the board of the company,” wields significant power to influence company policies and procedures, and serves as a significant cost to the company.¹⁴¹

Whereas a plea agreement would involve a court proceeding, the problem with this seemingly more attractive route is that there is little to no judicial

¹³² Bixby, *supra* note 5, at 115.

¹³³ Grimm, *supra* note 8, at 255.

¹³⁴ *Id.* at 273, 276.

¹³⁵ Koehler, *Big, Bold, and Bizarre*, *supra* note 31, at 126.

¹³⁶ Lauren Giudice, Note, *Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement*, 91 B.U.L. REV. 347, 361 (2011).

¹³⁷ Thomas, *supra* note 26, at 451–52.

¹³⁸ *Id.* at 452.

¹³⁹ *Id.* at 452–53.

¹⁴⁰ Giudice, *supra* note 136, at 370.

¹⁴¹ Westbrook, *supra* note 2, at 558.

scrutiny of NPAs or DPAs.¹⁴² “Prosecutors[,] therefore[,] enjoy a significant amount of discretion when negotiating and creating pre-trial diversion agreements, which may make it difficult for corporations to know what to expect *ex ante*.”¹⁴³ Still, the body of “law” comprised of FCPA enforcements has mostly been developed through these privately-negotiated agreements.¹⁴⁴ While access to prior agreements is growing, companies are not likely to know all of the details of the NPAs or DPAs that companies in their positions have signed under similar circumstances.¹⁴⁵ Companies have little bargaining rights and are at the mercy of what is proposed in the NPA or DPA by the agency threatening further criminal action. “In fact, no business entity has publicly challenged either enforcement agency in an FCPA case in the last twenty years.”¹⁴⁶

V. ADDITIONAL GUIDANCE

Despite the pervasive uncertainty throughout the law, there have been no regulations to implement or further clarify the FCPA subject to one minor exception¹⁴⁷: companies may submit detailed, written descriptions of prospective conduct and ask the Attorney General to issue an opinion to determine if the conduct would violate the FCPA or not.¹⁴⁸ These opinions are then published by DOJ but do not apply to any other company besides the original requestor.¹⁴⁹ “A compliant FCPA Opinion creates a rebuttable presumption for future actions against the issuer or domestic concern that the described conduct complies with the FCPA.”¹⁵⁰ The opinion binds DOJ but does not bind other agencies, such as the SEC, from pursuing enforcement actions against the exact action that DOJ may have recommended.¹⁵¹ DOJ has released only fifty-six opinions to date, generally one to three per year in recent years.¹⁵² The SEC has a similar Opinion Release program, intended to provide

¹⁴² Koehler, *Big, Bold, and Bizarre*, *supra* note 31, at 126; Koehler, *Façade*, *supra* note 54, at 909; Giudice, *supra* note 136, at 361.

¹⁴³ Giudice, *supra* note 136, at 366.

¹⁴⁴ Koehler, *Façade*, *supra* note 54, at 910.

¹⁴⁵ Giudice, *supra* note 136, at 366.

¹⁴⁶ Westbrook, *supra* note 2, at 562.

¹⁴⁷ *Id.* at 502–03.

¹⁴⁸ Sheahen, *supra* note 75, at 486.

¹⁴⁹ Giudice, *supra* note 136, at 357. *See generally* DOJ Fraud Section, *FCPA Opinion Procedure Releases*, JUSTICE.GOV, <http://www.justice.gov/criminal/fraud/fcpa/opinion> (last visited Aug. 20, 2012).

¹⁵⁰ Giudice, *supra* note 136, at 357.

¹⁵¹ *Id.*

¹⁵² *See* DOJ Fraud Section, *supra* note 149; DOJ Fraud Section, *FCPA Review Procedure Releases*, JUSTICE.GOV, <http://www.justice.gov/criminal/fraud/fcpa/review> (last visited Aug. 20, 2012).

guidance to the prospective action of businesses, but it was last used to clarify its interpretation of the FCPA in 1981.¹⁵³

VI. THE IMPACT OF THE FCPA AND FUTURE REFORMS

At the time that the FCPA was first made law, the United States was more unique than other countries in prohibiting bribes to another country's officials.¹⁵⁴ But perhaps as a result, the United States lost international contracts in countries where foreign firms have bribed foreign governments but U.S. firms are prohibited by law from doing so.¹⁵⁵ Other countries even allowed bribes to be tax deductible.¹⁵⁶ In one study, about fifty-one percent of companies delayed a business initiative and fourteen percent canceled a business initiative due to confusing anti-corruption laws.¹⁵⁷ But the philosophy of the law is that it would enable American businesses to act with honesty and integrity, often improving productivity, efficiency, and product quality in order to compete with foreign firms.¹⁵⁸

Since the enactment of the FCPA, many countries have enacted anti-corruption laws geared towards international business, including Germany and the United Kingdom.¹⁵⁹ The World Bank and the International Monetary Fund do require various anti-bribery procurement practices and laws before countries are eligible for assistance.¹⁶⁰ They also evaluate corruption levels before they develop assistance strategies and implement anti-corruption projects.¹⁶¹

FCPA enforcement, while already taking place across the world stage, may only be enhanced by other country's own enforcement of their own anti-bribery laws. In 2010, the United Kingdom passed the Bribery Act 2010, criminalizing bribes to domestic and foreign officials, commercial bribery, and the receipt of a bribe.¹⁶² The U.K. Bribery Act surpasses the FCPA in "criminalizing the payment, offer, or promise of a bribe, as well as the request, acceptance, or agreement to accept a bribe."¹⁶³ In contrast, the FCPA does not cover the request for or the receipt of a bribe by a foreign official.¹⁶⁴

Meanwhile here in the United States, more and more individuals and organizations are calling for various reforms of the FCPA. The U.S. Chamber of Commerce issued a white paper highly critical of this new wave of FCPA

¹⁵³ Westbrook, *supra* note 2, at 563.

¹⁵⁴ Westbrook, *supra* note 2, at 511; Zyla, *supra* note 4, at 14.

¹⁵⁵ Zyla, *supra* note 4, at 14.

¹⁵⁶ *Id.* at 17.

¹⁵⁷ Westbrook, *supra* note 2, at 498.

¹⁵⁸ Zyla, *supra* note 4, at 14–15.

¹⁵⁹ Westbrook, *supra* note 2, at 513–14.

¹⁶⁰ Zyla, *supra* note 4, at 19.

¹⁶¹ Dworsky, *supra* note 45, at 693.

¹⁶² Jordan, *supra* note 72, at 863–64.

¹⁶³ Trautman & Altenbaumer-Price, *supra* note 76, at 158.

¹⁶⁴ Yockey, *supra* note 12, at 802.

enforcement.¹⁶⁵ Other former enforcement officials, international organizations, and the media have been vocally critical of the law's recent application.¹⁶⁶ Many agree the law contains certain ambiguities that could be better addressed through the legislative or administrative process.¹⁶⁷

VII. WHAT COMPANIES SHOULD DO

First and foremost, companies both large and small need to establish a corporate compliance program. Not only is having a compliance program a best practice, it also helps to provide a defense against liability for the corporation or perhaps for its senior executives, if possible.¹⁶⁸ A successful compliance program begins with a culture of compliance throughout a corporation.¹⁶⁹ Corporate compliance programs should include training programs, hotlines for employee reports of bribes and other illegal activity, and monitoring programs.¹⁷⁰ The compliance program should also include a code of conduct with sanctions and penalties for those who violate the code.¹⁷¹

The U.S. Sentencing Commission's Guidelines provide for a mitigated sentence if the seven elements for an "effective compliance and ethics program" are in place, including, establishing standards to prevent criminal conduct, ensuring appropriate oversight by high-level personnel, communicating the procedures and requirements to employees, and monitoring and updating the compliance program when needed.¹⁷²

The compliance program has to extend to conducting all due diligence before contracting with third parties as partners, or other relationships established through mergers and acquisitions. Intermediaries, including shipping agents, vendors, contractors, and customs agents, and their potential violations may carry back to the corporation.¹⁷³ Failing to conduct due diligence, failing to hire an experienced law firm, and ignoring red flags will

¹⁶⁵ ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, U.S. CHAMBER OF COMMERCE, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT (2010), *available at* http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf.

¹⁶⁶ Koehler, *Big, Bold, and Bizarre*, *supra* note 31, at 141–44.

¹⁶⁷ Westbrook, *supra* note 2, at 576–77 (providing a "top ten list" of FCPA questions that the government should address).

¹⁶⁸ Jordan, *supra* note 72, at 869.

¹⁶⁹ Cherie O. Taylor, *The Foreign Corrupt Practices Act: A Primer*, 17 CURRENTS: INT'L TRADE L.J. 3, 8 (2008).

¹⁷⁰ Zyla, *supra* note 4, at 16.

¹⁷¹ Dworsky, *supra* note 45, at 695.

¹⁷² Giudice, *supra* note 136, at 370.

¹⁷³ David Isaak, *FCPA Compliance—Navigating the Minefield of Intermediaries*, 17 CURRENTS INT'L TRADE L.J. 22, 22 (2008).

demonstrate that you took affirmative steps not to uncover bribery and other illegal acts and may result in FCPA actions.¹⁷⁴

Adding audits by independent parties at regularly-scheduled intervals only helps to strengthen the compliance program and allows for an independent review of items that might be missed from an internal perspective.

Each company should draft literature for employees to read and review. Companies should ensure that all employees sign a statement that they understand the information provided. All employees who conduct international business should know the limits of their conduct and procedures to follow if a situation occurs. A retaliation-free system to report potential violations will help to ensure compliance or quick discovery of any potential FCPA violations.¹⁷⁵

As a standard practice, companies must maintain accurate books and records. They must also keep records of all transactions that the business does, internationally and domestically. Companies are playing with fire if they have any items “off-book.” Publicly-held companies must establish standards for its “books and records” that comply with the accounting obligations of the FCPA.¹⁷⁶ Even privately-held companies should put accounting and auditing measures in place through a compliance program to track all payments.¹⁷⁷

In addition, companies should assemble a “response team” including legal counsel. The time to call a lawyer is not when an individual identifying himself or herself with DOJ, FBI, or SEC appears at your door. But given that situation, companies can still seek guidance from the government. Companies can request a statement from DOJ or ask about proposed business conduct. The main goal is to be proactive, rather than reactive.

If a corporation does frequent business with foreign officials, then it may be a good idea to have an independent consultant serve as a supervisor for all negotiations, such as a law firm or similar professional, or insert anti-bribery clauses in the contracts.¹⁷⁸ Another best practice is to get any “unusual payment requests” reduced to writing to shed light on all transactions.¹⁷⁹

VIII. CONCLUSION

The basic premise of the FCPA remains as true today as when initially enacted thirty-five years ago: corrupt business transactions are unethical and undermine public confidence in the free market system. However, practitioners should be careful to note that while the law has undergone a few updates, the most profound update has been in the enforcement of the law. In light of this aggressive enforcement, there remains a lack of clarity in many of the FCPA's provisions. Therefore, legal counsel should caution companies to become

¹⁷⁴ Trautman & Altenbaumer-Price, *supra* note 76, at 160–61.

¹⁷⁵ Taylor, *supra* note 169, at 8.

¹⁷⁶ *Id.* at 7.

¹⁷⁷ *Id.*

¹⁷⁸ Yockey, *supra* note 12, at 808.

¹⁷⁹ *Id.*

proactive in rooting out illegal payments and practices not only within their own organization, but also with third-party providers, business partners, and potential subsidiaries or parent organizations before a merger or acquisition. Extensive compliance programs may be expensive, but they are the only tool to prevent and lessen the effects of an FCPA enforcement action.